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No. 77-13

In the Supreme Court of the United States

OCTOBER TERM, 1977

BLEVINS POPCORN COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A7-A8) is not reported. The Board's decision and order (Pet. App. A8-A19) are reported at 218 NLRB 689. The Board's decision in the related representation proceeding (Pet. App. A20-A47) is not reported.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1-A2) was entered on May 4, 1977. The petition for a writ of certiorari was filed on July 1, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly upheld the order of the National Labor Relations Board overruling petitioner's objections to the conduct of a representation election and directing petitioner to recognize and bargain with the union.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), are set forth at Pet. 4-5.

STATEMENT

1. Pursuant to a representation petition filed by the American Federation of Grain Millers, AFL-CIO (the "Union"), the Regional Director of the National Labor Relations Board conducted an election among petitioner's production and maintenance employees (Pet. App. A20). The Union won the election by a vote of 41 to 18 (Pet. App. A21). Petitioner filed objections to the election. After an investigation the Board overruled the objections and certified the Union as the bargaining agent (Pet. App. A11, n. 2, A20-A43).

The Board's findings and conclusions respecting petitioner's objections were as follows:

a. Petitioner contended that the Union misrepresented to employees both that petitioner improperly was paying its portion of hospitalization insurance premiums out of the employees' pension and profit-sharing funds, and that the Union's proposed collective-bargaining contract would go into effect automatically if the Union won the election (Pet. App. A22). The Board concluded that, assuming *arguendo* that a Union agent made the statement regarding payment of insurance premiums, it "could

readily be recognized and evaluated by the employees as campaign propaganda and not based upon facts within any special knowledge of [the Union]" (Pet. App. A24). Similarly, the Board concluded that employees were not misled by the representation that a contract would go into effect automatically, because they "are generally able to understand that a union cannot obtain benefits automatically by winning an election but must seek to achieve them through collective bargaining" (Pet. App. A28). In support of its conclusion, the Board noted that petitioner had distributed a booklet during the campaign that stated specifically that no contract would automatically go into effect if the Union won the election, since petitioner was not required to agree to any demands made by the Union (Pet. App. A27-A28).

b. Petitioner contended that the Union gave financial inducements to employees by guaranteeing free hospitalization insurance and by paying employees to vote for the Union (Pet. App. A28-A29). The Board found no evidence that employees were paid or offered money to vote for the Union (Pet. App. A30). The Board also found that, although one employee stated that a Union representative indicated that the employees would receive free insurance if the Union won the election, that statement was contrary to the recollection of many other employees. Some recalled a discussion of "free" insurance that would come out of dues deductions, while others recalled that free insurance had always been considered a benefit to be bargained for (Pet. App. A29-A30). The Board concluded that the evidence did not support the charge that the Union promised the employees free insurance (Pet. App. A30).

c. Petitioner contended that supervisory employees coerced employees into supporting the Union (Pet. App. A32). The Board found that the employees accused of this

conduct were not supervisors (Pet. App. A11, n. 2), and that, in any event, their conduct did not warrant setting aside the election (R. 89-91).[1]

d. Petitioner contended that the Union's challenge to some truckdrivers' eligibility to vote created confusion among the employees and thus interfered with the conduct of the election (Pet. App. A30-A31). The Board rejected this contention: the Union had made clear that the truckdrivers' eligibility was challenged because they worked at a different location than the employees in the voting unit (Pet. App. A31-A32).

2. Petitioner refused to bargain with the Union after the Board had certified it. The Union complained to the Board and an unfair labor practice proceeding was initiated, at which petitioner reiterated its objections to the election. The Board ruled that petitioner's refusal to bargain violated Section 8(a)(5) and (1) of the Act (Pet. App. A8-A14) and ordered petitioner to bargain with the Union upon request (Pet. App. A17). The court of appeals enforced the Board's order, concluding that the Board's findings "are supported by substantial evidence in the record taken as a whole" and that "the Board's order is otherwise free from legal error" (Pet. App. A7-A8).

ARGUMENT

Petitioner's principal contention (Pet. 10-11) is that the court of appeals applied an erroneous legal standard in reviewing the Board's order. In particular, petitioner asserts (Pet. 11) that the court considered that the determination whether an election is fair is "entrusted to the Board alone"—language taken from an earlier decision of the

[1]"R." refers to the materials contained in the "Volume IV, Pleadings" in the court below. A copy has been lodged with the Clerk of this Court.

court (*National Labor Relations Board* v. *Mar Salle Inc.*, 425 F. 2d 566, 570 (C.A.D.C.)). The court did not mention *Mar Salle* in its decision in this case, however, or indicate in any respect that it was abdicating its responsibility meaningfully to review the Board's order.[2] Rather, in concluding (Pet. App. A8) that "substantial evidence in the record taken as a whole" supported the Board's ruling that the Union conduct assailed by petitioner did not interfere with employee free choice in the election, the court properly applied the standard of review set forth in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474. The court's ruling turns upon the particular facts of this case and does not warrant further review. Moreover, the Board's conclusion is in accord with settled principles. See *National Labor Relations Board* v. *Golden Age Beverage Co.*, 415 F. 2d 26, 30 (C.A. 5); *National Labor Relations Board* v. *Red Bird Foods, Inc.*, 399 F. 2d 600, 602 (C.A. 7).[3]

[2]Indeed, although the court in *Mar Salle* did state (quoting from *National Labor Relations Board* v. *Waterman Steamship Co.*, 309 U.S. 206, 226) that the "control of the election proceeding, and the determination of the steps necessary to conduct that election fairly [are] matters which Congress entrusted to the Board alone," it did not stop there. Rather, it went on to review the reasons that the Board gave in rejecting the employer's election objections and to satisfy itself that there was "substantial evidence in the record to indicate that the Board properly applied" its election criteria and that the "actions complained of could not reasonably have been expected to have a significant impact on the outcome of the election." *National Labor Relations Board* v. *Mar Salle Inc.*, *supra*, 425 F. 2d at 570-571.

[3]Contrary to petitioner's assertion (Pet. 13-19), the decision below does not conflict with that of any other court of appeals. Each of the other decisions petitioner cites, like the present case, turned upon the facts; none invoked a standard of review different from that followed by the court below.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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